

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
Petition of CRC Communications of Maine and Time Warner Cable, Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended)))))	WC Docket No. 10-143

**REPLY COMMENTS OF LINCOLNVILLE NETWORKS, INC.,
TIDEWATER TELECOM, INC., OXFORD TELEPHONE COMPANY,
AND OXFORD WEST TELEPHONE COMPANY**

Lincolnvill Networks, Inc., Tidewater Telecom, Inc., Oxford Telephone Company, and Oxford West Telephone Company ("Lincolnvill and Oxford RLECs")¹ hereby submit these Reply Comments to comments submitted in support ("Supporting Comments") of the Petition for Preemption ("Petition") which was filed by CRC Communications of Maine, Inc. ("CRC") and Time Warner Cable Inc. ("TWC") (collectively the "Petitioners"). For the reasons stated herein, the Lincolnvill and Oxford RLECs respectfully request that the Supporting Comments addressed herein be disregarded by the Commission and that the Commission dismiss and deny the Petition.

I. The Supporting Comments Provide No New Substantive Arguments.

The Supporting Comments basically reiterate the arguments which have already been made in the Petition itself. These arguments have been thoroughly discredited by the comments filed in opposition to the Petition by the Maine Public Utilities Commission ("MPUC"), and the other comments submitted in opposition to the Petition (collectively the "Opposing Comments").

Moreover, some of the Supporting Comments are without sufficient context, in that they are offered

¹ The Lincolnvill and Oxford RLECs are telecommunications carriers, incumbent local exchange carries ("ILECs") and rural telephone companies ("RLECs") as defined in 47 U.S.C. §§ 153 & 251(h) located in rural areas of Maine.

by entities which do not make clear their membership and their interests in the subject matter of the Petition, such as “NTCH” and “Verizon.”²

II. The Supporting Comments Ignore the Weight of Relevant Authority.

The Supporting Comments repeatedly claim that the Rural Exemption applies only to the provisions of Section 251(c) and does not apply to the negotiation/arbitration requirements regarding the provisions of Section 251(b). The Supporting Comments forget, or ignore, that Section 251(c)(1), which they acknowledge is subject to the Rural Exemption, is the source of the negotiation/arbitration requirement with respect to the provisions of Section 251(b). This failure to acknowledge or understand the significance of Section 251(c)(1) is at the heart of the fundamental common flaw in the Petition and the Supporting Comments.

The Verizon Comments claim that a clear majority of the courts and state commissions which have considered whether the Section 252 arbitration process applies to Section 251(b) obligations of RLECs (in the absence of the termination of the Rural Exemption) “have held that the arbitration process does apply.”³ Verizon cites pages 24-25 and a list of cases in footnote 73 of the Petition. The Verizon Comments ignore the fact that the Commission itself does not appear in any such list, nor could it. The Commission has stated differently, and contrary, to the position urged in the Petition in its decisions in the Z-Tel Case and the Telephone Number Portability Case (as already thoroughly discussed in the Opposing Comments).⁴ The only court case cited at pages 24-

² Footnote 1 to the Verizon Comments states that “The Verizon companies participating in this filing (Verizon) are the regulated, wholly owned subsidiaries of Verizon Communications, Inc.” No further information is provided with regard to exactly which Verizon subsidiaries are participating in the filing. Perhaps the use of the term “regulated” was intended to suggest that only the Verizon ILEC subsidiaries are participating in these comments. However, at least under Maine law, competitive IXC and CLEC subsidiaries of Verizon are considered to be regulated, although lightly regulated, by the MPUC. The “Comments of Verizon” failed to make clear whether they purport to be speaking on behalf of the Verizon subsidiaries’ interests solely as ILECs, or their interests solely as CLEC/IXCs, or both.

³ Verizon Comments at page 9.

⁴ *In the matter of CoreComm Communications, Inc., and Z-Tel Communications, Inc. v. SBC Communications, Inc. et al., Order on Reconsideration*, File No. EB-01-MD-017, 19 FCC Rcd 8447 (2004)(“Z-Tel”) at 8454-8455 (¶18).

25 of the Petition is the Bell South decision of the Sixth Circuit, which contains no “holding” at all with regard to this issue, but only generalized introductory dicta not bearing on the issue in the case. In fact, the only court case which has squarely addressed whether Section 252 arbitration applies to an RLEC, in the absence of the termination of its Rural Exemption, is the federal United States District Court decision in the Brazos Case,⁵ which completely supports the MPUC Order. Therefore, the fact of the matter is that the clear majority of federal law, in fact all of the federal law on this point, as found in the 1996 Act, in the Rules and Decisions of the Commission, and in the United States District Court case, support the decision of the MPUC.

III. The Supporting Comments Promote a Revisionist Constructionism of the 1996 Act.

The Supporting Comments have chosen to ignore the proper interpretation of the relevant provisions of the 1996 Act, as rendered by the MPUC in a dispassionate and analytical process. Rather, the Supporting Comments seek to rewrite the 1996 Act to enhance their current business plans and policy perspectives. But the law has not changed, and their pleas for administrative activism to rewrite the law should be rejected by the Commission. When Congress authorized the Commission to preempt certain state and local legal requirements which contravened the 1996 Act, Congress did not authorize the Commission to rewrite the 1996 Act.

Paragraph 18 states “Neither the general interconnection obligation of Section 251(a) ... is implemented through the negotiation and arbitration scheme of Section 252.” See also footnote 44 to paragraph 18:

Section 251(c) obligates incumbent LECs “to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection [*i.e.*, subsection (c)].” 47 U.S.C. § 252(a)(1), permits ILECs to negotiate agreements “without regard to the standards set forth in subsections (b) and (c) 251,” but does not mention subsection 251(a).⁴

(Unlike the reconsideration order being cited, the initial decision regarding Z-Tel was vacated on appeal on grounds separate from this issue.)

See In the Matter of Telephone Number Portability, First Memorandum Opinion and Order on Reconsideration, CC Docket No. 95-116, RM-8535, 12 FCC Rcd 7236 (1997)(“*LNP Recon Order*”). The Commission stated:

We note, however, that Section 251(f)(1) does exempt rural carriers from the duty to negotiate in good faith over the terms and consideration so agreements to fulfill the duties of Section 251(b), including number portability.

⁵ *Sprint Communications Company L.P. v. The Public Utility Commission of Texas*, Case No. A-06-CA-065-SS, filed August 14, 2006 (W.D. Texas) (“*Brazos*”).

The Verizon Comments lay initial groundwork for Verizon's ultimate argument that the Commission should ignore the words and the intent of Congress, by means of Verizon's repeated effort to portray the Rural Exemption as not being intended by Congress to have any durable effect. The Verizon Comments precede references to the Rural Exemption with the term "temporary," as if the word "temporary" appeared in the Act.⁶ But, as we all know, that word does not appear in the Rural Exemption provision of the 1996 Act. The fact of the matter is, the 1996 Act does not establish a "temporary" rural exemption. The 1996 Act establishes a Rural Exemption that will continue to exist, unless the state commission finds that the economic burden, universal service and technical feasibility criteria are satisfied. In this regard, it is worth noting that it is the law of the land that the CLEC has the burden to prove that the criteria have been met.⁷ The theory of a temporary or provisional Rural Exemption is not consistent with this assignment of the burden of proof, and is more consistent with the now properly discredited view that the RLEC bears the burden under Section 251(f)(1).

What bothers Verizon and other supporters of the Petition is that the MPUC has acted responsibly in adhering to its legal obligation to take seriously what Congress places in the law. The Petition, the Supporting Comments, the touted excerpt from the National Broadband Plan, and the underlying TWC letter, are part of their concerted effort to cause this Commission to disregard the law as enacted by Congress.

Verizon calls this effort a "best reading" of the 1996 Act. Verizon's reading is, in effect, a new reading of the 1996 Act, which invites the Commission to engage in an incorrect legal construction which meets the goals of the Petitioners and Supporting Commenters. The policy goal

⁶ See, for example, Verizon Comments page 2, line 13; page 5, line 19; page 6, line 8. See also NTCA Comments, p. 3, l. 14 ("provisional").

⁷ See *Iowa Utilities Board v. FCC*, 219 F.3d 744, 764 (8th Cir. 2000).

of Congress, underlying its establishment of the Rural Exemption, is to protect the universal service interests of customers in rural areas which require the economic health of the provider of last resort in these areas. The MPUC Order is consistent with this goal and with the law.

IV. Insinuations Regarding the Maine PUC Process are Fallacious.

A number of the Supporting Comments suggest that the MPUC has acted in a manner showing preference for the RLEC interests on Rural Exemption issues.⁸ Such insinuations are without basis, and the commenters have offered no basis for these suggestions. Yet, they feel free to cast aspersions on the administrative process in Maine in order to affect an administrative decision of the Commission, which is required to be made on the basis of the law, not insinuations.

As the Petitioners and the Maine RLECs know very well, the MPUC conducted a rigorous regulatory process in which all parties were required to meet their procedural and substantive obligations. Furthermore, the MPUC is bound by the provisions of the Maine Administrative Procedure Act and Constitutional due process to conduct a fair and unbiased proceeding, including strict prohibitions on ex parte communications. The MPUC complies with these requirements and unsubstantiated insinuations are tantamount to accusing the MPUC of acting contrary to the law. The Commission should demand the withdrawal of such insinuations, or strike them from the record. The Commission should also question whether the need of Supporting Commenters to rely on derogation of the administrative process of the MPUC suggests the Supporting Commenters' own lack of confidence in the validity of their legal arguments.

⁸ For example, the NTCH comments insinuate that the MPUC is a "captive regulator" (NTCH Comments, p. 2) and intimate that it questions "what motivated the Maine PUC here." Verizon insinuates that the MPUC made an effort to find a way to frustrate TWC's ability to offer VOIP services (Verizon Comments, p. 4).

V. The Supporting Comments Attempt to Use the MPUC as a Red Herring.

One is tempted to ask in light of the Verizon Comments: Why did the Petitioners file a petition for Section 253 preemption of the MPUC, rather than file a request for declaratory ruling?⁹ Certainly the Petitioners are well aware of declaratory rulings, which are more generic. Yet they chose to narrowly focus their attack solely on the MPUC, via preemption of the MPUC Order. Perhaps they were concerned that a declaratory ruling proceeding might lead to the participation of a broader range of parties who represent the public interests. Perhaps they believed that prospects for success were greater in a proceeding where TWC's ample resources and allies were arrayed against a single state regulatory commission in a small rural state. Perhaps they believed that it could garner greater sympathy by being in a position to bemoan the fact that the proceedings in Maine required more than 120 days to conclude, even though they willingly participated in that process.¹⁰

The Lincolnville and Oxford RLECs have been at a loss to explain TWC's bringing to bear its enormous resources in a prolonged campaign against a few small rural telephone companies in Maine. It would seem that TWC's behavior may be explained by a desire to use the proceedings in Maine as the poster child for a broader strategy by TWC, and to use the process in which it willingly participated to attempt to taint the MPUC, and thereby advance its strategy. The proposed shift to a declaratory ruling process at the 11th hour of this proceeding gives appropriate rise to such questions, which the Commission should consider in the circumstances of this case. The

⁹ Verizon's suggestion of a last minute conversion of this case to a proceeding for declaratory ruling by administrative fiat is inconsistent with principles of administrative and due process, which require notice and opportunity to be heard for parties potentially affected by the results of a proceeding.

¹⁰ If the MPUC were biased for the RLECs and against the Petitioners as the Petitions and their allies insinuate, the MPUC would have dismissed their original petition with prejudice (as the Lincolnville and Oxford RLECs believe should have been done). Instead, MPUC gave the Petitioners a second bite at the apple (which was not legally necessary to do) and allowed them to come back with a second petition to terminate the rural exemption of the RLECs. The Petitioners took advantage of this opportunity and plunged the RLECs into another year of costly litigation.

Commission should also fully reject the use of the Maine proceedings as a red herring to justify a sweeping rewrite of the 1996 Act and specifically reject the Petition to preempt the MPUC, which has diligently and properly interpreted and carried out its duties under the 1996 Act.

VI. Conclusion.

For all of the reasons stated herein, the Lincolnville and Oxford RLECs respectfully request that the Commission dismiss and deny the Petition in its entirety.

Respectfully submitted,

Lincolnville Networks, Inc., Tidewater
Telecom, Inc., Oxford Telephone Company,
and Oxford West Telephone Company

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